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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS PATRICK NICHOLS et al.,

Defendants and Appellants.

F075509

(Super. Ct. Nos. VCF293620A,  
VCF293620B)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant Thomas Patrick Nichols.

Karriem Baker, under appointment by the Court of Appeal, for Defendant and Appellant Sandi Lyn Thornhill.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Poochigian, Acting P.J., Smith, J. and Snauffer, J.

**STATEMENT OF THE CASE**

On December 8, 2014, an information was filed in Tulare County Superior Court, charging Thomas Patrick Nichols and Sandi Lyn Thornhill (Nichols and Thornhill, respectively; collectively, defendants) with possession of methamphetamine for sale during the commission of which a principal was armed with a firearm (Health & Saf. Code,<sup>1</sup> § 11378; Pen. Code, § 12022, subd. (a)(1); count 1), possession of marijuana for sale during the commission of which a principal was armed with a firearm (§ 11359; Pen. Code, § 12022, subd. (a)(1); count 2), possession of methamphetamine while armed with a firearm (§ 11370.1, subd. (a); count 8), and misdemeanor possession of drug paraphernalia (former § 11364.1, subd. (a); counts 9 & 10). In addition, Nichols was charged with possession of a firearm by a convicted felon (Pen. Code, § 29800, subd. (a)(1); count 3), possession of ammunition by a person prohibited from possessing a firearm (*id.*, § 30305, subd. (a)(1); count 5), and possession of body armor by a convicted felon while armed with a firearm (*id.*, §§ 12022, subd. (a)(1), 31360; count 7). Thornhill was charged with possession of a firearm by a convicted felon (*id.*, § 29800, subd. (a)(1); count 4), and possession of ammunition by a person prohibited from possessing a firearm (*id.*, § 30305, subd. (a)(1); count 6). Finally, as to each felony count, it was alleged that Nichols had suffered two prior strike convictions. (*Id.*, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) In addition, probation limitations pursuant to Penal Code section 1203, subdivision (e)(4) were alleged as to Nichols, while probation limitations pursuant to that section and Penal Code section 1203.07, subdivision (a)(11) were alleged as to Thornhill.

Prior to trial, defendants moved to suppress evidence (Pen. Code, § 1538.5) on the ground the affidavit in support of the search warrant, whereby their residence was

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<sup>1</sup> Further statutory references are to the Health and Safety Code unless otherwise stated.

searched and evidence resulting in the current charges discovered, contained material misstatements and omissions. Specifically, they alleged the facts in the affidavit were from a search conducted pursuant to a permission form with a forged signature. After a hearing, the motion was denied. A subsequent motion for sanctions due to destruction of the original permission form was also denied. A motion to set aside count 1 of the information (Pen. Code, § 995) was granted.

On January 30, 2017, a plea agreement was reached. Defendants waived their constitutional rights pursuant to *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122, and were informed of the effect of a no contest plea. The parties stipulated there was a factual basis for the pleas based on the preliminary hearing transcript. Defense counsel (who represented both defendants) stated he had advised defendants of the nature of the charges, consequences of their pleas, and any possible defenses.

Defendants pled no contest to count 2 (as a misdemeanor), and counts 8 and 10.<sup>2</sup> Nichols pled no contest to counts 5 and 7. Thornhill pled no contest to count 6. Counts 3 and 4 were dismissed. The strike allegations concerning Nichols were stricken over the People's objection, and the other special allegations also were stricken. The court found defendants knowingly and voluntarily waived their constitutional rights, and that their pleas were freely, voluntarily, and knowingly made.

Defendants were sentenced on April 5, 2017. In keeping with the court's indicated sentence, Thornhill was placed on probation for three years on various terms and conditions, including that she serve 90 days in jail, while Nichols was placed on probation for three years on various terms and conditions, including that he serve 180 days in jail.

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<sup>2</sup> There are discrepancies in the record concerning whether defendants' no contest pleas included count 9 or that count was dismissed. We need not resolve the matter since it makes no difference to either defendant's appeal.

Each defendant filed a timely notice of appeal and obtained a certificate of probable cause. As to each, we will order correction of the sentencing minute order to conform to the oral pronouncement of judgment, and affirm.

### **FACTS**<sup>3</sup>

Early on the morning of January 4, 2014, Tulare County Sheriff's Deputy Coldren responded to defendants' residence in Terra Bella, to assist in an ongoing investigation into an attempted homicide. Upon arrival, he made contact with Thornhill. During his initial search of the residence, Coldren located a package containing a crystal rock-like substance on a dresser in the master bedroom. Also on the dresser was a nylon gun belt with a firearm.

Coldren subsequently undertook a more extensive search of the house. In the master bedroom, he found small plastic bags, one of which contained a crystal rock-like substance; multiple firearms; scales; several glass pipes that appeared to contain methamphetamine residue; handcuffs; and a television monitor that was actively showing the front of the residence. In the entryway was a container that held a crystal rock-like substance. In the kitchen were several glass pipes, beakers, and a hot plate. In the living room was a package containing a crystal rock-like substance that appeared to be methamphetamine, marijuana, a scanner tuned to Tulare County Sheriff's Office channels, and several rounds of ammunition. Methamphetamine pipes were found in a second bedroom. Firearms and boxes of ammunition were found in the utility room, while a bulletproof vest was found in a closet.

In total, officers located 1.724 grams of methamphetamine and 59 pounds of marijuana. There were 28 vacuum-sealed bags containing one to two pounds each of

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<sup>3</sup> Since the parties stipulated that the preliminary hearing transcript provided a factual basis for defendants' pleas, we draw our factual summary from that document.

marijuana. In the master bedroom were over 100 empty one-inch by one-inch plastic bags. In Coldren's opinion, the marijuana was possessed for sale.<sup>4</sup>

## **DISCUSSION**

### **Nichols's Appeal**

Nichols's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel stating that Nichols was advised he could file his own brief with this court. By letter dated August 8, 2017, we invited Nichols to submit additional briefing. To date, he has not done so.

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues.

### **Thornhill's Appeal**

#### **A. Probation Condition Authorizing Search of Electronic Devices**

As recommended by the probation officer, the court imposed, as a condition of Thornhill's probation, that she submit to a search of her person, residence, automobile, and any object under her control, including any electronic device such as a computer or cell phone, with or without a warrant.

Thornhill now contends the condition must be stricken, as it is unconstitutionally overbroad and violates her Fourth Amendment expectation of privacy. She argues it allows for searches of vast amounts of personal information without being reasonably

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<sup>4</sup> The parties stipulated the total amount of marijuana found in the house was 99.7 grams. Coldren's opinion concerning possession for sale was given in response to a hypothetical question that included that amount of marijuana individually packaged in 28 packages. He subsequently testified that in real life, the 99.7 grams was not located in baggies, but rather a total of 59 pounds of marijuana, with one to two pounds in each of 28 bags, was located at the residence. There was also marijuana loose within a tool box.

related to the state's compelling interest in her rehabilitation and public safety.<sup>5</sup> We agree with the Attorney General that Thornhill forfeited this claim by failing to object at sentencing.

“A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*)) “The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights — bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

“Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal.” (*Sheena K.*, *supra*, 40 Cal.4th at p. 880.) “ ‘The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.’ ” (*Id.* at p. 881.) Nevertheless, “[a]n obvious legal error at sentencing that is ‘correctable without referring to factual findings in the record or remanding for further findings’ is not subject to forfeiture.” (*Id.* at p. 887.) “[A] challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court can be said to present a pure question of law.” (*Ibid.*, italics omitted.) Thus, such a challenge is not forfeited by the failure to object in the lower court. (*Id.* at pp. 888-889.)

The search condition challenged here is broadly worded and impacts Thornhill's Fourth Amendment rights. Its purpose and whether it is unconstitutionally overbroad,

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<sup>5</sup> The issue of the validity of electronics search conditions is currently before the California Supreme Court in *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923, and numerous other cases.

however, can only be ascertained by reviewing the facts underlying her convictions. (See *People v. Kendrick* (2014) 226 Cal.App.4th 769, 777.) Indeed, Thornhill relies on the factual record to support her claim, arguing there was no evidence or information that she was using electronic devices for illicit purposes. Had she timely objected, the trial court could have narrowed or deleted the condition, or explained why it was necessary in this case. (See *People v. Relkin* (2016) 6 Cal.App.5th 1188, 1195.) Because Thornhill's challenge does not present a pure question of law that can be resolved without reference to the factual record or a remand for further findings, she has forfeited her contention by failing to object. (See, e.g., *People v. Stapleton* (2017) 9 Cal.App.5th 989, 994; *People v. Smith* (2017) 8 Cal.App.5th 977, 987; cf. *Sheena K.*, *supra*, 40 Cal.4th at pp. 880-888 [challenge to condition of probation that minor "not 'associate with anyone disapproved of by probation' " presented pure question of law; vagueness and overbreadth were easily remediable on appeal by modifying condition to contain knowledge requirement].) Moreover, because Thornhill's failure to object has resulted in an incomplete record with respect to the trial court's reasoning regarding the imposition and wording of the condition, we decline to exercise our discretion to review the claim despite the forfeiture. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 887, fn. 7.)

Thornhill cites *People v. Valdivia* (2017) 16 Cal.App.5th 1130, review granted February 14, 2018, S245893 and *People v. Appleton* (2016) 245 Cal.App.4th 717 in support of her claim the challenged probation condition is unconstitutionally overbroad. In each case, however, the defendant raised a timely objection to the probation condition sought to be challenged on appeal. (*Valdivia*, *supra*, at p. 1135; *Appleton*, *supra*, at pp. 721, 722-723.) Accordingly, the opinions do not detract from our conclusion the issue has been forfeited.<sup>6</sup>

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<sup>6</sup> Nichols likewise did not object when the same electronics search condition was imposed on him. Accordingly, our analysis and conclusion would have applied equally to him, had he raised the issue in his appeal.

**B. Surcharges and Penalty Assessments**

At sentencing, the trial court orally ordered Thornhill to pay \$1,855 in drug fees, fines, and penalty assessments. According to the probation officer's report, \$150 of this amount represented a criminal laboratory analysis fee pursuant to section 11372.5, \$300 of this amount represented a drug program fee pursuant to section 11372.7, and the remainder represented penalty assessments pursuant to various code sections.

Thornhill now contends the surcharges and penalty assessments must be stricken, because the criminal laboratory analysis fee and drug program fee are administrative rather than punitive in nature and therefore are not subject to penalty assessments. In so arguing, Thornhill relies primarily on *People v. Martinez* (2017) 15 Cal.App.5th 659, *People v. Webb* (2017) 13 Cal.App.5th 486, *People v. Watts* (2016) 2 Cal.App.5th 223, and *People v. Vega* (2005) 130 Cal.App.4th 183. After briefing was completed in the present case, however, the California Supreme Court disapproved all four opinions and concluded the fees specified by sections 11372.5 and 11372.7 constitute punishment. (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1105, 1119, 1122 & fn. 8.) Accordingly, Thornhill's argument fails.<sup>7</sup>

**C. Conflict Between Minute Order and Oral Pronouncement of Judgment**

The probation officer recommended that Thornhill be ordered, as a condition of probation, to seek and maintain employment. The clerk's sentencing minutes reflect imposition of this condition. It was not included in the trial court's oral pronouncement of judgment, however. Thornhill now contends, and the Attorney General agrees, that the oral pronouncement of judgment controls; hence, the minute order must be amended

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<sup>7</sup> Nichols was ordered to pay the same drug fees, fines, and penalty assessments. Accordingly, our analysis and conclusion would have applied equally to him, had he raised the issue in his appeal.



to delete the employment condition of probation. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Zackery* (2007) 147 Cal.App.4th 380, 385-386.)<sup>8</sup>

### **DISPOSITION**

The judgments are affirmed.

The trial court is directed to cause to be prepared amended minutes of each defendant's April 5, 2017, sentencing hearing to delete any requirement that either defendant seek and maintain employment.

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<sup>8</sup> The sentencing minutes contain the same error with respect to Nichols. The Attorney General having conceded the minute order must be corrected as to Thornhill, and there being no difference between Thornhill's and Nichols's cases in this regard, we will also direct that the minute order be corrected as to Nichols. (See *People v. Taylor* (2004) 118 Cal.App.4th 454, 456.)